

Jervis Public Library Association, Inc. and Civil Service Employees Association, Local 1000, AFSCME, AFL-CIO, Petitioner. Case 3-RC-7986

July 28, 1982

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, the parties herein agreed to waive the right to a hearing and the right to file briefs and entered into a stipulation with attached exhibits.¹ Thereafter, the Regional Director for Region 3 transferred this case to the Board for decision because there is no precedent, subsequent to *National Transportation Service, Inc.*,² concerning whether the Board will assert jurisdiction over "public" libraries. The parties waived their right to file briefs to the Board.

Upon the entire record in the case, the Board makes the following findings:

The Jervis Public Library Association, Inc. (herein called the Employer), is engaged in the operation of a library lending books and other materials such as periodicals and films for circulation, reference services, and interloans (of books, etc.) to the public. Its sole facility is located at 613 North Washington Street, Rome, New York.

The city of Rome, New York, but for its exempt status under the Act, is directly engaged in interstate commerce and annually purchases goods and materials valued in excess of \$50,000 which are shipped directly to it from points located outside the State of New York. In the last year, the Employer received books valued in excess of \$50,000 for use in its library which were shipped to it directly from points directly outside the State of New York.

The Jervis Library Association was incorporated on December 13, 1894, by the Secretary of the State of New York, pursuant to chapter 343 of the laws of 1875, and on February 28, 1895, was admitted to the University of the State of New York by the board of regents. In 1972 the original certificate of incorporation was amended pursuant to section 216 of the Education Law to the Jervis Public Library Association, Inc. The Employer is a member of the Mid-York Library System, an association of libraries in Oneida, Madison, and Herkimer Counties in the State of New York.³

¹ A hearing in the instant matter was scheduled for December 29, 1980, the date on which the stipulation was entered into. Only the Employer and the Petitioner appeared for the hearing and no other parties have sought to intervene in the instant proceeding.

² 240 NLRB 565 (1979).

³ The Mid-York Library System has offices at 1600 Lincoln Avenue, Utica, New York.

The Mid-York Library System, through state funding under the "Education Law," provides to its members services such as centralized purchasing of books, processing of interloan requests, film services, reference services, and book mobiles. The Employer functions as the central library for the Mid-York Library System and as such provides reference services for the system and participates in intersystem loan of books. The services of the Employer are available to the public in Oneida, Madison, and Herkimer Counties. There are approximately 25,000 cardholders (registered borrowers) of the Employer.

The Employer is governed by an 11-person board of trustees.⁴ Trustees must be citizens of the United States and residents of the city of Rome. New trustees are elected for 3-year staggered terms by the dues-paying members of the Employer at its annual meeting.⁵ The mayor of the city of Rome is an *ex officio* member of the Board. The Board approves policies and the budget, and has the power to appoint and remove the library director.⁶ The Board otherwise has no operating relationship over day-to-day labor relations.

As provided in the bylaws of the Employer, the library director is the administrative officer of the Employer and is the liaison between the library staff and the board. The library director is required to act in the capacity of professional expert to the board; to recommend programs, policies, and changes; and to prepare an agenda for and attend all board meetings.⁷ It is the duty of the library director to carry out the policies and decisions of the board as they affect both clientele and employees; to be responsible for the preparation of the annual request for funds;⁸ to select books and other materials; and to discharge all other duties imposed upon

⁴ The 1972 amendment to the original certificate of incorporation also changed the number of trustees from 13 to no less than 9 or more than 11.

⁵ The bylaws of the Employer provide that members "shall be such persons at least 18 years of age residing in the city of Rome who are registered borrowers and have applied in writing for membership and have paid dues."

⁶ While the stipulation states that the board of trustees has the power "to appoint and remove the Director of the Association," the bylaws of the Employer nowhere describe a position entitled "Director of Association" and there is no reference to such a position elsewhere in the stipulation. However, the bylaws of the Employer do provide "the Library Director shall be appointed and removed by a vote of the majority of the Board." We therefore find that the reference in the stipulation to the board's power to appoint and remove the "Director of the Association" relates to the position of library director which the board is empowered to fill.

⁷ The library director has a right to speak on all matters under discussion before the board, but is not a member of the board and has no vote.

⁸ The library director submits an annual budget to the board which examines the budget and has the authority to make changes in the director's recommendations.

him by law⁹ or by regulation of the board. The library director is also in charge of library personnel and is responsible for the assignment of duties, morale, service standards, and staff development, and has the authority to appoint new staff members, to promote, dismiss, and transfer staff members, and to approve authorized salary increments. The library director must report any personnel action taken to the board.¹⁰ The parties stipulated that the day-to-day operations of the Association are controlled by its library director, currently William A. Dillion, who has ultimate responsibility for hiring, firing, disciplining, scheduling vacations, leave, wages, and benefits.¹¹ Reporting to the library director and sharing these responsibilities is an assistant director, currently Carole Favler.

The employees of the Employer are employed directly by it and have no other employee-employer relationship. Employees of the Employer are covered under the city of Rome's employees health insurance plan¹² and are in the "New York State's Retirement System."¹³ The Employer makes contributions to both of these plans for its employees. The Employer sets its own policy as to sick leave, "personnel" leave days, meal breaks, discipline, hiring and firing, wages, and all other terms and conditions of employment.

The annual gross revenue of the Employer is approximately \$500,000: Approximately \$335,000 is received from the city of Rome; \$60,000 from Oneida County; \$13,000 from fines of members for late returns or damages; \$2,000 from membership dues; \$10,000 from providing copying services, pencils, and old books; \$4,600 directly from the State of New York under the Local Sponsor Incentive Aid Program;¹⁴ \$50,000 from the State of New York through the Mid-York Library System for central library development; and \$45,000 from the State of New York through the Mid-York Library System for central book aid.

⁹ Sec. 90.4 of the Commissioner of Education's regulations on central libraries sets forth the standards for central libraries, addressing minimal requirements in such areas as staffing, volume of new acquisitions in general classifications, and hours of service to the public.

¹⁰ The Employer has declined to recognize the Petitioner as the collective-bargaining representative of its employees. There is no prior history of collective bargaining or representation of employees of the Employer. No other labor organizations have requested representation from the Employer.

¹¹ While the city of Rome provides the Employer with a substantial amount of funds, it has no control or relationship over hiring, firing, wages, and other terms and conditions of employment of the Employer's employees.

¹² The Employer is free to join another program and the city of Rome does not make direct contributions to the health plan for employees of the Employer.

¹³ The parties herein have no direct knowledge of how the relationship with the State Retirement System arose or how it is governed.

¹⁴ This aid is received under a formula based on financial aid received from local sources.

With respect to the funds from the city of Rome, the Employer prepares an annual budget and submits it to that city. Annually, the Employer meets with the treasurer and the Mayor of the City of Rome to review the budget. The Employer's proposed budget is reviewed with the city of Rome. In the fall of 1980 the Employer proposed to the city an 8-percent increase over the previous year. The city, however, did not give the Employer an increase and the \$335,000 figure represented the same amount received from the city of Rome the preceding year. Also annually, the Employer and the city of Rome enter into a contract which requires the former to provide library services. The contract is primarily a bookkeeping measure to formalize the payment by the city of Rome to the Employer.

As to the Central Library development funds, the Employer submits a budget for approval to the Mid-York Library System's board of trustees.¹⁵ Mid-York passes the approved budget to the State of New York. The money is sent to Mid-York by the State of New York which passes the money to the Employer. This budget covers materials and salaries of the Employer's employees who are performing the services the Employer provides for Mid-York. No employee of the Employer is identifiable as a person performing only Mid-York work.

The funds received annually from the State of New York through the Mid-York Library System are for central book aid. These funds are used for the purchase of adult nonfiction reference materials. The Employer does not submit a budget for these funds. The Employer orders books through Mid-York and the purchase price is subtracted from the Employer's \$45,000 account maintained by Mid-York.¹⁶

In determining whether to assert jurisdiction here the Board must determine whether the Employer is a political subdivision within the meaning of Section 2(2) of the Act¹⁷ and, if not, whether the Employer has sufficient control over the employment conditions of its employees to enable it to bargain with a labor organization as their representative.¹⁸ We turn first to the political subdivision question.

¹⁵ This budget is primarily an estimate of hours performed by the Employer's employees for Mid-York work.

¹⁶ Utica Public Library is not a member of the Mid-York Library System, but there are currently negotiations under way between Mid-York and the Utica Public Library which may result in the Utica Library joining the Mid-York Library System as a co-central library. If this occurs, the Employer stands to lose at least half of the central library development and control aid funds.

¹⁷ *N.L.R.B. v. The Natural Gas Utility District of Hawkins County, Tennessee*, 402 U.S. 600 (1971).

¹⁸ *National Transportation Service, Inc.*, 240 NLRB 565. Chairman Van de Water and Member Hunter do not agree with the holding of *National*
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As stated by the Supreme Court in *Hawkins County, supra*, the Board has "limited the exemption for political subdivisions to entities that are either (1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate."¹⁹

The Employer has been admitted to the University of the State of New York for over 85 years and is operated pursuant to regulations promulgated by the State's Commissioner of Education. Recently, the Employer's certificate of incorporation was amended pursuant to the Education of Law of the State. Additionally, although the Employer receives some funds from memberships, fines, and the sale of copying services and supplies, the record establishes that the city of Rome and the State of New York exercise significant control over the Employer's expenditures by reason of the required submission of an annual budget to each prior to funding approval. We note, moreover, that the Employer's employees participate in the New York State Retirement System and the city of Rome's employee health insurance plan, both of which the Employer contributes to on their behalf.²⁰ Considering the degree of governmental operating and budgeting control, and the longstanding history of this employer as a state-authorized educational facility, we conclude that the Employer is an agent of the State of New York because it constitutes, in the words of the Supreme Court in *Hawkins*, an "administrative arm" of the State in providing educational services to the public.²¹

Accordingly, we shall dismiss the petition herein.²²

ORDER

It is hereby ordered that the petition filed herein be, and it hereby is, dismissed.

MEMBER ZIMMERMAN, dissenting:

I cannot join my colleagues' finding that the Employer is an "administrative arm" of the State of

New York and therefore not within the Board's jurisdiction. That finding has no foundation in the record of this case and clearly contradicts the jurisdictional standards of *National Transportation Service, Inc.*,²³ which governs this case. Although my colleagues do not reach the issue, the stipulated facts establish that the Employer is capable of engaging in meaningful collective bargaining over terms and conditions of employment with a labor organization. I would therefore assert jurisdiction over the Employer, in accordance with the *National Transportation* standards.

The majority declines to assert jurisdiction over the Employer under the guise that Jervis Public Library Association, Inc., is exempt as a political subdivision within the meaning of Section 2(2) of the Act. Its basis for this finding is that the Employer (1) has for many years been a member of the University of the State of New York; (2) is operated pursuant to regulations promulgated by the Commissioner of Education of the State of New York; (3) provides educational services to residents of the State; and (4) receives significant financial support from state and local government sources. In fact, however, only (1), and possibly (2), above are even relevant to the Employer's status as a political subdivision, while (3) and (4) have no significance to matters of statutory jurisdiction.

The majority's rationale here is a throwback to the time when the Board applied the so-called "intimate connection" and "local-in-character" tests as standards for determining whether it would be an appropriate exercise of the Board's discretion to assert jurisdiction over an entity. However, as discussed *infra*, the Board in *National Transportation Service, Inc.*, and its progeny, rejected these tests and adopted the "degree-of-control" test as the sole nonmonetary jurisdictional consideration, and this is still Board law. Accordingly, the nature of the service provided by the employer and the source of the employer's funding are immaterial to the question of jurisdiction so long as the employer is capable of engaging in meaningful collective bargaining over terms and conditions of employment.

As the majority correctly observed, the Board has "limited the exemption for political subdivisions to entities that are either (1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate."²⁴ On the facts as fully set forth in the majority opinion, the second standard is not applicable here, and my col-

Transportation. In their view the appropriate standard is the "intimate connection" test. See in this connection their dissenting opinion in *Wordsworth Academy*, 262 NLRB 438 (1982).

¹⁹ 402 U.S. at 604-605.

²⁰ There is no evidence that these plans represent anything other than what their names suggest, benefits for state and municipal employees respectively.

²¹ *The New York Institute for the Education of the Blind*, 254 NLRB 664 (1981).

²² In light of this finding, we find it unnecessary to determine whether the Employer has sufficient control over the employment conditions of its employees to enable it to bargain with a labor organization as its representative.

Members Fanning and Jenkins adhere to the principles of *National Transportation*. Were the Employer not exempt under Sec. 2(2), they would apply the degree-of-control tests as articulated in that decision.

²³ 240 NLRB 565 (1979).

²⁴ *N.L.R.B. v. Natural Gas Utility District of Hawkins County, Tennessee*, 402 U.S. 600, 604-605 (1971).

colleagues do not suggest that it is. What they do find, relying on *The New York Institute for the Education of the Blind*,²⁵ is that the Employer is an "administrative arm" of the State of New York.

The instant case, however, is distinguishable from *The New York Institute* in several critical respects. In *The New York Institute* the employer was established directly by the legislature of the State of New York some 150 years ago and since that time the legislature has "consciously and specifically denominated the Institute . . . as its agent in satisfying the State's perceived obligation or constitutionally mandated requirement of providing the State's residents with suitable education."²⁶ In contrast, Jervis Public Library was established pursuant to laws applicable to the incorporation of libraries in general.²⁷ Further, there is no evidence that the legislature has either consistently or specifically denominated the Employer as an agent to satisfy constitutionally mandated functions.²⁸ Nor is there evidence that the legislature has been involved in the purchase of land or the construction of buildings for the Employer as it was for *The New York Institute*. Additionally, while the State, through the Commissioner of Education, "exercises full power of appointment of the students" to *The New York Institute*, there is no evidence that the State has any comparable administrative control over the Employer. For example, the State does not select reading and other materials for the Employer, nor does it select its employees. In fact, the State's control over the Employer through the Commissioner of Education seems to be limited to the setting of minimal criteria in such areas as the number of staff, the volume of new acquisitions in general classifications, and hours of service to the public. The Employer cannot therefore be characterized as a "state-utilized facility," as *The New York Institute* was identified by the Board. Accordingly, I find no support for the finding of my colleagues that the Employer was created directly by the State so as to constitute an administrative arm thereof.

If there is no statutory proscription against asserting jurisdiction over the Employer—and I find that there is not—then the Board must apply its nonmonetary discretionary standard in determining

whether to assert jurisdiction over the Employer. The question of asserting jurisdiction over public libraries has previously been considered by the Board. In *Queens Borough Public Library*²⁹ and *Nassau Library System*³⁰ the Board found that it would not effectuate the purpose of the Act to assert jurisdiction because of the nexus between the employer public libraries and various governmental instrumentalities which provided virtually all of the revenues for their operations.³¹

However, following these decisions, the Board, in *National Transportation*, *supra*, asserted jurisdiction over a local schoolbus company which derived 85 percent of its revenues from the State for its schoolbus operations. In reaching this result, the Board found that it was no longer necessary

. . . to examine the relationship between an employer and an exempt entity for which it performs services for some abstract "intimate connection" which has no bearing on the employer's ability to bargain effectively with a labor organization as representative of its employees and which requires a meticulous and . . . superfluous analysis of the facts in order to ascertain whether in the Board's opinion the employer's services are essential to the purposes of the exempt entity, universally recognized as a governmental function, statutorily mandated or noncommercial in nature. [240 NLRB at 566.]

Thus, the Board abandoned the use of the intimate-connection test in ascertaining whether jurisdiction should be asserted over an employer with close ties to an exempt entity and established the degree-of-control test as the sole appropriate jurisdictional consideration (apart from dollar amount). Thereafter, in *Soy City Bus Services, Division of R. W. Harmon & Sons, Inc.*,³² the Board found that since the degree-of-control test was "by itself" the appropriate nonmonetary standard for determining jurisdiction, the local-in-character test, which focused in part on the services rendered by the contracting employer and the fact that those services fulfilled a traditional governmental obligation of the exempt entity, was also abandoned by the Board as a basis for declining jurisdiction. Thus, these cases effectively overrule *Queens Borough Public Library*, *supra*, and *Nassau Public Library System*, *supra*.

Applying the degree-of-control test to the instant case, I would find that the Employer, while deriv-

²⁵ 254 NLRB 664 (1981).

²⁶ *Id.* at 667.

²⁷ I take judicial notice of the fact that the Law of New York, chap. 343, "An Act for the incorporation of library societies" (May 15, 1875), pursuant to which the Employer was incorporated in 1894, sets forth the procedures for incorporating associations of citizens of the State who come together for the purpose of "founding, continuing and perpetuating a library. . . ."

²⁸ I take judicial notice of the fact that the Education Law, Chap. 216, under which the Employer's certificate of incorporation was amended in 1972, is a provision under which any institution "of educational or cultural value" may incorporate.

²⁹ 195 NLRB 974 (1972).

³⁰ 196 NLRB 864 (1972).

³¹ In neither case did the Board decide the status of the employer under Sec. 2(2) of the Act.

³² 249 NLRB 1169 (1980).

ing most of its revenues for its operation from various governmental instrumentalities, is not itself an exempt governmental subdivision. The record establishes that, while fiscal constraints are placed upon the Employer by its various sources of revenue, the library director is responsible for the preparation of the annual budget submitted to the member-selected board of trustees for approval.³³ Although the Commissioner of Education's regulations on central libraries set certain minimal standards for the operation of such libraries, the overall policies of the Employer, including those pertaining to wage levels and hours of individual employees, hiring and firing, the selection of a health insurance and pension plan, and all other terms and conditions of employment, are made by the Employer. Implementation of the Employer's policy rests with the board-appointed library director who is responsible for the day-to-day operation of the Employer, including labor relations. In light of the

³³ While not critical to my finding that it would effectuate the purposes of the Act to assert jurisdiction over the Employer, I note that the Education Commissioner's regulations, sec. 90.3 and 90.4, which are in evidence indicate that public libraries may, but are not required to, apply for state aid.

foregoing, I would find that the Employer has virtually full control over matters affecting wages, hours of employment, and working conditions, that it is capable of engaging in meaningful collective bargaining over terms and conditions of employment with a labor organization.³⁴

The question remaining is whether the Employer's operation has a substantial effect on commerce so as to warrant the assertion of the Board's jurisdiction. Since the Board has not had the occasion to set a jurisdictional amount for public libraries, and any proposal which I would make regarding an appropriate standard would be superfluous given the current posture of this proceeding, I reserve my view in this matter for another day. It suffices to say that, absent considerations of whether the Employer meets some yet to be determined appropriate monetary jurisdictional standard for public libraries, I would find that under the principles of *National Transportation* it would effectuate the purposes of the Act to assert jurisdiction over the Employer.

³⁴ See *Loma Prieta Regional Center, Inc.*, 241 NLRB 1071 (1979).